Supreme Court, U.S.
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No. _____

IN THE SUPREME COURT OF THE UNITED STATES

ROBERT JOHN BRADY,

Petitioner,

v.

JO ANNE B. BARNHART,
Commissioner of the Soeial Security Administration,

Respondent.

On Petition for a Writ of Certiorari

To the United States Court of Appeals

For the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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36 pp

QUESTIONS PRESENTED

1. Whether, in the enactment, enforcement, and interpretation of the Administrative Procedure Act (APA), the government of the United States, the Legislative, Executive, and Judiciary, materially breached the United States Constitution by failing to comply with the core structural concept of the separation of powers, as described in the Proceedings of the Constitutional Convention and in The Federalist Papers and under such explicit provisions as Articles I, II, and III and the Ninth and Tenth Amendments and by the obvious failure to utilize the Article V procedures for amendment rather than the statutory method used.

2. Whether the res judicata of an Iowa State Court judgment of insanity and involuntary commitment for an indeterminate time, with a legal and equitable basis for tolling under Iowa and California law, entitles Petitioner to qualify under the Social Security Act for timely current insured status, special insured status, periods of disability and earnings record freeze or, on the contrary, under Social Security Ruling 79-2c, complete forfeiture of all disability benefits and nearly all retirement benefits by over ruling tolling in all States despite due process, equal protection of the Fifth and Fourteenth, retained and reserved rights under the Ninth and Tenth Amendments and Congressional intent in the Social Security Act.

3. Is the State of Iowa the responsible party for Petitioner's resulting loss of rights and benefits without due process and equal protection of law?

4. Whether it is good behavior for the Judiciary under Article III to traditionally ignore the effect of the Administrative Procedure Act, 5 U.S.C. Sec. 551 et seq.,

upon the Constitutional Separation of Powers and the absolute necessity of an Article V Amendment for such a structural alteration to the Constitution effecting enforcement of all parts of the Constitution; e.g., Articles I through VI, Amendment VII, IX, and X and the enforcement of mandatory Federal statutes, [Sec. 201 of the Evidence Code, 28 U.S.C. Sec. 1738) and interpretation of the Social Security Act, 42 U.S.C. Secs. 416(i), 421, 423, in this case.

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OPINIONS BELOW

The opinion of the court of appeals (App., infra, 3a-4a) is unreported. The order of the district court (App., infra, 7a-8a) is unreported. The report and recommendation of the Magistrate Judge (App., infra, 9a-16a) is unreported. The opinion of the administrative agency (App., infra, 42a-60a) is unreported.

JURISDICTION

The court of appeal's judgment was entered on May 29, 2002. A timely petition for rehearing with a suggestion for rehearing en banc was denied on September 11, 2002 (App., infra, 1a). Jurisdiction of the court of appeals was pursuant to 28 U.S.C. Sec. 1291. The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1254(1). Justice O'Connor extended the time for filing this petition to and including January 9, 2003 under application A 02-426. The attorney for the Social Security Administration was served in addition to the Solicitor General. The attorney for the Iowa Chief Justice was also served.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article I. provides in relevant part: "All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives." U.S.CONST. art. I, sec. 1.

Article II. provides in relevant part: "The executive Power shall be vested in a President of the United States of America." U.S. CONST. art. II, sec. 1, cl. 1.

Article II. is further reproduced in relevant part at App., infra, .

Article III. provides in relevant part: "The judicial Power of the United States shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish." U.S. CONST. art. III, sec. 1.

Article IV. provides in relevant part: "The United States shall guarantee to every state in this union, a republican form of government, and shall protect each of them against invasion; and on application of the legislature, or of the executive (when the legislature cannot be convened), against domestic violence." U.S. CONST., art. IV, sec. 4.

Article VI. provides in relevant part: "The senators and representatives before-mentioned, and the members of the several state legislatures, and all executive and judicial officers, both of the United States and of the several states, shall be bound by oath or affirmation, to support this constitution." U.S. CONST., art. VI, sec. 3.

Article VI. is further reproduced in relevant part at App., infra, 61a.

The Fifth Amendment provides in relevant part: "No person shall be deprived of life, liberty, or property without due process of law." U.S. CONST. amend. V., sec. 1, cl. 4

The Seventh Amendment is reproduced at App., infra 60a.

The Ninth Amendment provides: "The enumeration of certain rights shall not deny or disparage rights retained by people." U.S. CONST. amend. IX.

The Tenth Amendment provides: " The powers not delegated to the United States by the Constitution, nor

prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. CONST. amend. X.

The Eleventh Amendment provides: "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." U.S. CONST. amend. XI.

The Fourteenth Amendment is reproduced in relevant part at App., infra, .

5 U.S.C. sec. 3331 is reproduced in relevant part at App., infra, .

28 U.S.C. Sec. 1738 is reproduced in relevant part at App., infra, .

42 U.S.C. Sec 416(i) is reproduced at App., infra, .

42 U.S.C. Sec. 421(a)(1) is reproduced at App., infra,

42 U.S.C. Sec. 421(i)(1) is reproduced at App., infra, .

42 U.S.C. Sec. 423[c][1][B] is reproduced at App., infra, .

42 U.S.C. Sec. 423(d) is reproduced at App., infra, .

The relevant provision of Rule 201(d), Federal Rules of Evidence, is reproduced at App., infra, .

STATEMENT

The jurisdiction of the district court was invoked under 42 U.S.C. Sec. 405(g) (Social Security Act] and pursuant to 28 U.S.C. Sec. 1331 (general federal question jurisdiction.) Although not questioned by the Courts below, it is reasonable to assume that Federal jurisdiction in this case is subject to the prior jurisdiction of an involuntary and indeterminate civil commitment resulting from an Iowa State Court insanity judgment in the unusual circumstances of this case where there has been no valid discharge.

As was prominently declared in each step of the judicial proceedings and as stated in the Petition for rehearing with a Suggestion for Rehearing En Banc:

> "This is a case or controversy involving the separation of powers as it relates to the creation and operation of administrative law in the United States under the written United States Constitution as it should be contrasted to the unwritten British Constitution which is absent the specific constraints in the American document." Petition for Rehearing with a Suggestion for Rehearing En Banc, p. 4.

A. James Madison's View

This case concerns first and foremost the separation of powers, words not explicitly used in the Constitution, but implicit in the first three articles taken collectively. The acknowledged Father of the Constitution, James Madison, fourth President of the United States, described this aspect of the Constitution's novel and complex structure in The Federalist Papers thusly:

> "The constitution of Massachusetts has observed a sufficient though less pointed caution, in expressing this fundamental article of liberty. It declares 'that the legislative department shall never exercise the

executive and judicial powers, or either of them; the executive shall never exercise the legislative and judicial powers, or either of them; the judicial shall never exercise the legislative and executive powers, or either of them.' This declaration corresponds precisely with the doctrine of Montesquieu, as it has been explained, and is not in a single point violated by the plan of the convention." The Federalist Papers, Federalist 47, The Particular Structure of the New government and the Distribution of Power Among Its Different Parts, Author: James Madison.

B. The Case at the District Court:

In the Order Adopting Report and Recommendation, the Hon. Thomas J. Whelan, United States District Court for the Southern District of California, states at page 6:

> "In this case Plaintiff was 62 years old when he first filed for disability benefits in 1993. Accordingly, Plaintiff only qualifies for disability benefits if he can meet the 20/40 requirement outlined in the first subsection above. See 20 C.F.R. Sec. 404.320)e) ...Plaintiff's substantial gainful activity only produced 11 QCs in the forty quarter period prior to Plaintiff claiming disability in 1993 (Tr. 55) Thus, Plaintiff has insufficient quarters of coverage to qualify and Plaintiff may not collect benefits for the periods claimed as a matter of law." [Note: the correct age is 61 at time filed (b. 12/26/31).

In the United States District Court memorandum of points and authorities in support of plaintiff's cross-motion for summary judgment (Social Security) and in opposition to defendant's motion for summary judgment, Petitioner states at p. 15:

"Some Iowa decisions, currently applicable in that state concerning a finding of insanity, are important to consider in this case because the Plaintiff has been under a judgment declaring him insane as a result of his schizophrenia at all relevant time in this case, yet this issue was methodically ignored by the ALJ in this case who made his decision and findings without medical information including that contained in a still viable state court judgment finding of insanity.

"An insane person cannot make a valid grant. Abel v. Abel, 245 Iowa, 907, 65 N.W.2d 68 (1954). One judicially declared insane and found insane by commissioners and committed to a hospital was presumed to be of unsound mind. (In re Ost's Estate, 211 Iowa 1085, 235 N.W. 2d 70 (1931)). When insanity is once established it will be presumed to continue until the contrary is shown, and burden to show is then cast upon the one who asserts a return to sanity. (State v. Allen, 166 N.W.2d 752 (1969).

"A court is required to terminate proceedings and completely discharge a person who has been involuntarily hospitalized for serious mental impairment when the court receives a medical report from the chief medical officer of a mental health facility indicating that the patient has been tentatively discharged. Op. Atty. Gen. (Chickering), Nov. 26, 1980."

In the United States District Court memorandum of points and authorities in support of plaintiff's cross-motion for summary judgment (Social Security) and in opposition to defendant's motion for summary judgment, Petitioner states at p. 18-19:

"Some effective instruction on properly enforcing the full faith and credit statute, as it applies to a state court judgment of insanity, is obviously needed for the huge federal agency that is the SSA. It views state judgments nuisances to

be ignored or, when given a second chance, side-stepped. Perhaps it is a nuisance, a necessary nuisance to go back in time to the 1950's and consider how a legally insane person (unknown to himself) would earn quarters of coverage and file a Social Security disability claim (not aware of the nature of his illness). At that time, Iowa officials were aware of the work problems of the Plaintiff and over the years were charged with knowledge of the operation of the Social Security Act and then need for timely filing a benefits claim."

United States District Court memorandum of points and authorities in support of plaintiff's cross-motion for summary judgment (Social Security) and in opposition to defendant's motion for summary judgment, Petitioner states at pp. 20-21, fn. 21:

> "Social Security Rulings are "final opinions and orders and statements of policy and interpretations" that have been adopted by the Administration. 20 C.F.R. Sec. 402.35 (1999). Once published, these rulings are binding precedent upon ALJs. Gatliff v. Commissioner of Social Sec. Admin., 172 F.3d 690, 695 n. 2 (9th Cir. 1999), citing Heckler v. Edwards, 465 870, 873 n. 3, 104 S.Ct. 1532, 79 L.Ed.2d 878 (1984). The power of Congress has been usurped by this administrative fiat. One can ask where is the case law on this ruling (it appears to be nonexistent). It can be reasonably presumed the rule has been so effective in destroying claimant's cases that there are neither lawyers nor cases to challenge this administrative aggrandizement."

In the United States District Court, Objections to Report and Recommendations, pp. 2-3, Petitioner stated the first separation of powers, Article V and Administrative Procedure objection:

> "The Magistrate Judge's appraisal that there was substantial evidence is inaccurate when plaintiff had neither representation nor an unbiased Administrative

Law Judge, In ignoring judicial notice and lodgment, he simply joined hands with an agency also with dubious legal basis." [reference to footnote 3] footnote 3:) "The Administrative Procedure Act (5 U.S.C. Secs. 551 et seq.) violates the Separation of Powers that is implicit and at the very core of our Constitution, therefore, it requires a constitutional amendment for its enactment, under U.S. Const. Art. V rather than a statute. This is a most serious 'oversight' and the plaintiff alleges the lack of effective agency control."

C. The Case at the Court of Appeal:

In the Brief of Appellant in the United States Court of Appeals for the Ninth Circuit, pp. 32-35, Petitioner stated:

"In this case, all evidence of disability was disallowed including a final judgment of an Iowa Insanity Commission declaring the appellant insane in 1957. The basis of this administrative and judicial exclusion can be traced implicitly and directly to Johnson v. United States, 572 F.2d 697, 699 (9th Cir. 1978) where it was held that incapacity does not excuse failure to file. The Ninth Circuit panel added that Congressional intent is unmistakable: 42 U.S.C. Sec. 402(j)(1) explicitly limits retroactive benefits to one year prior to filing. According to Yeiter v. Secretary of Health & Human Services, 818 F.2d 8, 9-10 (6th Cir. 1987), prior to 1958, there were no retroactive benefits and when Congress amended the statute to allow such benefits, it limited them to twelve months.

"The Sixth Circuit stated, 'there is simply no basis for construing that limitation inapplicable to certain disabilities.' The Court added that although the appellant was under a disability, her guardian or some other person acting on her behalf could have filed an application (to avoid the need for a

retroactive claim). Obviously, for this Appellant, it is the unabashedly reticent State of Iowa who should have filed on his behalf as an adult insane person. In 1981, the United States Supreme Court entered the fray and stated:

"Congress expressly provided in the Act that only one who 'has filed application for benefits may receive them, and it delegated to [the Secretary of Health and Human Services] the task of providing by regulation the requisite manner of application. A court is no more authorized to overlook the valid regulation requiring that applications be in writing than it is to overlook any other valid requirement for receipt of benefits.' Schweiker v. Hansen, 450 U.S. 785, 790, 101 S.Ct. 1468, 1472, 67 L.Ed.2d 685 (1981)."

"It is Appellant's position that he timely filed an application for all Social Security disability insurance benefits and any Medicare related benefits from the time he was first fully insured under the Act, as specially insured before age 31, with subsequent periods of disability. The disability, embodied in the insanity adjudication, is chronic and exists today as it has existed since June of 1954. The lodged DVA file is not irrelevant as held by the Court below in its exclusion of medical evidence and should be a part of this official record if needed. See the administrative record generally. Further, it is Appellant's position that Ninth Circuit decisions holding that incapacity does not excuse failure to file and that Congressional intent limits retroactive benefits to one year prior to filing either do not apply to the Appellant, are too broad in their sweep, grossly misconstrue Congressional intent, read too much into Schweiker, or are constitutionally and statutorily flawed as applied to the Appellant.

"The Appellant filed an application for Social Security disability insurance benefits on November 29, 1993, before age 62, as a parallel claim to a service-connected disability with the Department of Veterans Affairs filed August 15, 1989. In the course of gathering medical data for this claim, the Appellant eventually discovered his involuntary commitment as insane to the Mental Health Institute at Independence, Iowa by the Black Hawk County Insanity Commission, Waterloo, Iowa.

"It is respectfully submitted that Congress would not permit the Social Security Administration to overrule psychiatric expertise in the course of a psychiatric illness. The Ninth Circuit effectively legislated that result by their holding psychotics, who are unfortunately paid-up Social Security 'beneficiaries,' to a standard of reality."

In the Brief of Appellant, United States Court of Appeals for the Ninth Circuit, p. 47, Petitioner renewed his objection under the separation of powers, Article V, and the Administrative Procedure act by stating:

"Lastly, and of overriding importance, is the Administrative Procedure Act (5 U.S.C. Secs. 551 et seq.) itself, this Act clearly required a Constitutional Amendment for its creation but the three branches of government, led by a very small and secretive group, saw to it that the legislation was enacted and signed by a President. The Appellant's problems herein are an outgrowth of the infirmities in this Act and its derogation of the Separation of Powers, implicit and central to the Constitution of the United States."

In the Reply Brief of Appellant, United States Court of Appeals for the Ninth Circuit, p. 1, Petitioner reiterated his objection under the separation of powers, Article V, and the Administrative Procedure Act by stating:

"Much of the administrative law activity in the United States is based upon Social Security disability, it is derived from legislation that plainly requires a constitutional amendment because the separation of powers is illegally (breached.) After over fifty years of the Administrative Procedure Act, where are the cases addressing this issue?"

In the Petition for Rehearing with a Suggestion for Rehearing En Banc, United States Court of Appeals for the Ninth Circuit, pp. 2-3, Petitioner makes his strongest objection under the separation of powers, Article V, and the Administrative Procedure Act by stating:

"I. It Must Have Taken a Triumvirate

"1) Article V (Mode of Amendment) of the United states Constitution does not appear in any reported cases as it relates to the Administrative Procedure Act (5 U.S.C. Sec. 551 et seq.). Its mention in such context is conspicuously absent." (reference to footnote 1] "See United States Constitution—Analysis and Interpretation (United States Government printing Office, p. 897, et seq." (end of footnote 1) "In light of the Constitution and the civil and criminal laws of this nation, it is striking, extraordinary, and unusual to the greatest degree that the Administrative Procedure Act could be enacted in 1946 without the passage of a Constitutional Amendment under Article V of the United States Constitution. It is respectfully submitted that, absent such amendment, the Federal administrative proceedings as practiced within the Ninth Circuit, at this time and in this case, violate the implicit core principle of the United States Constitution, the separation of powers. More broadly, much of the statutory and judicial law supporting the structure of present day administrative procedure (within the United States government) does so in direct

derogation of Article V. Article V requires a Constitutional Amendment to accomplish such fundamental changes in the nation's governance."

REASONS FOR GRANTING THE PETITION

I. Alexander Hamilton's View

If ever there comes a time when the very core and fundamental structure of the United States Constitution, the separation of powers, is to be caste aside for an alternative, it is axiomatic that a constitutional amendment is an absolute necessity. Therefore, it is of overriding importance that such radical and far-reaching legislation as the Administrative Procedure Act, which is based on the merger of all three powers, be enacted only upon total compliance with Article V of the Constitution:

> "The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the Application of the Legislatures of two thirds of the several States, shall call a Convention for proposing Amendments, which, in either Case, shall be valid to all Intents and Purposes, as Part of this Constitution, when ratified by the Legislatures of three fourths of the several States, or by Conventions in three fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress; Provided that no Amendment which may be made prior to the Year One thousand eight hundred and eight shall in any Manner affect the first and fourth Clauses in the Ninth Section of the first Article; and that no State, without its Consent, shall be deprived of its equal Suffrage in the Senate." U.S. CONST. art. V.

Under the doctrine of separation of powers, a fundamental principle is that all acts of officials not derived from the delegated powers of the constitution are null and void from inception, not just from the point at which a court may find them unconstitutional. As a serious infringement of the separation of powers affects all parts of the Constitution, especially Articles I, II, and III, the Constitution is reproduced at App., infra, .

II. John Marshall's View

"We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given, the one or the other would be treason to the constitution.' Cohens v. Virginia, 6 Wheat. 261 (1821) (Chief Justice John Marshall, ignored as dicta).

III. Three-Branch Usurpation

The three branches of the federal government, with the cooperation of the respective States, have materially breached the United States Constitution by usurping constitutional powers belonging specifically to the people and the States without Article V authority in an attempt, not only to amend the constitution by statute, but to change its essential structure embodied in the doctrine of separation of powers by means of the 1946 Administrative Procedure Act, 5 U.S.C. Sec. 551 et seq. as amended.

B. Why and How Has the Constitution Been Breached?

Absent a careful and thoughtful judicial analysis of the need for a constitutional amendment for any change in the structure of the constitution, the Judiciary has moved on almost silently and inexorably to greater influence and control under the Administrative Procedure Act.

In 55 Years, there has been millions of Social Security disability insurance Act cases, but no cases on the necessity

for a constitutional amendment for the Administrative Procedure Act that alters the separation of powers and drives the Social Security Act. Instead, the three branches of government who have fostered the Act benefit from its operation at the expense of Petitioner and other unrecognized victims. During millions of adjudications by the Social Security Administration and other Federal agencies, the following events have occurred:

1) The Legislative branch has created a buffer for citizens' inquiries and complaints through a wide spectrum of agencies, however, far removed from the Executive or Legislative branch. The result shows in the increasing incumbency of elected politicians that has reached historic proportions. The blame for a never-ending host of government miscues can conveniently be laid on the agencies and away from elected officials. Senators and Congressmen appear to be comfortable with this "moat" as pressures discreetly can be brought to bear on the agencies, purportedly without the responsibility. Unfortunately, some members of the Legislative branch are unaware of the derivation of this truly major change in our constitutional practice or the results produced.

2) The executive branch has increased its nominal control over government, generally, by means of the phenomenal growth of the administrative agencies both within and without the executive departments. This interprets into far greater power and influence in Washington mainly at the expense of the States and the people. Control is nominally under the President, the Presidency thereby has greatly gained in influence while losing varying degrees of power to hundreds of agencies. The resulting enormity of the government has significantly increased the President's public relations power which, coupled with improved communication options, has given him a unique line to the people, almost an online relationship.

3) The Judicial branch has shifted much of the judicial business of the nation to administrative agencies that handle literally millions of cases. This has allowed the Judiciary to cull the civil cases and most significantly remove the right to civil jury trial for millions, although directly contrary to the Constitution. The absence of a jury trial assuages legal analysis, greatly reduces judicial knowledge of a case, and abates the case load of the average Federal judge a shocking amount. Most significantly, with this Court's holding in Chevron USA Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984), the Judiciary effectively steps out of the administrative litigation picture giving near-total discretion to the agencies thereby relieving a meaningful role and tremendous litigation burden from the Judiciary. In the process, agencies have become the alter egos of the Judiciary. Not to be ignored. a lucrative part of the legal business of the nation is now centered in Washington, especially for the large law firms, and away from the States.

C. Issue Avoidance Can Be Disastrous to an Integrated Constitution.

The system of selective issue avoidance with regard to the Administrative Procedure Act and Article V is an unhealthy policy on a supremely important issue. The extreme importance of the need for a constitutional amendment, to alter the Constitution as the Administrative Procedure Act has done, has been Congressionally, Judicially, and Administratively ignored for 55 years. Prosecutors have been intensively indoctrinated.

Because this issue has been swept under the rug for so long, by generations of officials, one cannot help to wonder if they thought it would go unnoticed. This issue is important to the Petitioner because he has been put out of Court and deprived of his security. As a result of the Administrative Procedure Act, a Ninth Circuit judicial opinion was transformed into a Social Security Ruling bringing forth a

Congressionally unintended statutory twist by Judiciary and Agency together further impoverishing unfairly the premium paying disabled in the form of Social Security Ruling 79-2c. Significantly, this case is important because it demonstrates a forfeiture of Social Security disability insurance benefits, to persons involuntarily civilly committed, who possess broad State tolling rights. This discriminatory policy was instituted and enforced by means of a statute waiting since 1946 to be declared unconstitutional, the Administrative Procedure Act.

This individual Petitioner fades in comparison to the many Americans who have given so much, including hundreds of thousands of lives to preserve and protect our constitutional form of government and the freedoms it has guaranteed generations of Americans.

The key to the Constitution of the United States is the separation of powers. It is the citizens' primary protection from an imperial government rather than a sovereign people. How this doctrine is respected or disrespected determines how well each branch of the Federal government and each of the States function in an appropriate built-in competition.

D. Who Would Intentionally Destroy The Very Structure Of The Nation's Greatest Legacy?

Anyone who would take aim with the intent to eliminate the very guts of the United States Constitution is depraved and dastardly. These individuals should not be protected simply because this Court opts out of the separation of powers/constitutional amendment issue. It is respectfully submitted that all branches of the Federal government must be brought into accord with the Constitution and away from the Administrative Procedure Act and the mass justice it has engendered. Who stands on watch here? The Supreme Court of the United States is the proper response because this is a case or controversy.

The Supreme Court could shed significant light on the breach that has occurred by directly comparing the

Constitution to the Administrative Procedure Act. Two important issues to the American people would immediately surface, separation of powers and Article V.

IV. One Branch with Special Responsibility

> Before he enter on the execution of his office, he shall take the following oath or affirmation: "I do solemnly swear (or affirm) that I will faithfully execute the office of the President of the United States, and will to the best of my ability, preserve, protect and defend the Constitution of the United States." U.S. CONST. art. II, sec. 1, cl. 7

A. The Constitution Gives The President A Special Responsibility—To Preserve The Constitution.

In order to preserve the Constitution one must know what it is that is to be preserved. The President's duty is to preserve both the separation of powers and Article V (and the Seventh, Ninth and Tenth Amendments as well.) In Petitioner's lifetime, all Presidents have demonstrated a reverence and understanding of the "Constitution" but there hasn't been a President that has demonstrated a reverence or even much understanding of the separation of powers and that includes their Attorney Generals. Query, whether the Attorney Generals, who did understand the operation of the separation of powers, and certain members of the Supreme Court as well, were intimidated or simply sought continued ignorance of this subject.

President Lincoln, with his humble education, had a deep appreciation of the separation of powers under the Constitution and an excellent understanding of the entire document. The early Presidents all had that comprehensive understanding and most carefully

abided by the separation of powers, President Jefferson and President Madison especially. President George Washington set the stage and the example by being a real stickler in his observance of the separation of powers. Abraham Lincoln's knowledge was put to the greatest test and he showed his mettle. By taking his oath of office literally, he was able to preserve our Constitution at the cost of a Civil War. Not a small part of the reason for this conflict was this Court's inappropriate decision in Dred Scott v. John F. A. Sandford, 60 U.S. 393, 19 How. 393, 15 L.Ed. 691 (1857).)

Presidents of late simply have not understood the separation of powers. Had they understood, they would have immediately dealt with the impostorship, the Administrative Procedure Act. The doctrine is a difficult concept and requires no small amount of concentrated effort. The risk of further failure to understand the operation of the separation of powers for the United States in today's world is simply beyond comprehension.

B. Two Branches, the Legislative and Judicial, with Separate, Plain and Vital Duties

Official duties in government require an oath of office. In the United States, for the oath of office to be meaningful, the Constitution's operation must be known. A person is not born with such knowledge and it isn't available on the local newsstand.

Under 5 U.S.C. Sec. 3331, an individual, except the President, elected or appointed to an office of honor or profit in the civil service or uniformed services, shall take the following oath:

"I, AB, do solemnly swear (or affirm) that I will support and defend the Constitution of the United States against all enemies, foreign and domestic; that I will bear true faith and allegiance to the same; that I take this obligation freely, without any mental reservation or purpose of evasion; and that I will well and faithfully discharge the duties of the office on which I am about to enter. So help me God.' This section does not affect other oaths required by law. "

All members of the Legislative, Executive and Judicial branches of the Federal government, except the President, repeat this very oath. It is a serious oath that is solemnly taken. It is not only the Federal officials who take an oath in support of the Constitution, Article VI provides: "the members of the several state legislatures, and all executive and judicial officers, both of the United States and of the several states, shall be bound by oath or affirmation, to support this Constitution." Therefore, State officials are equally held to support the United States Constitution, therefore, they too must be knowledgeable in their understanding of what the Federal Constitution means. This audience needs, for purposes of their oath, assurance that the constitutional clock is ticking correctly and, if not, why not. This Court is called to task.

Any lesson on how the Constitution works must begin with the separation of powers, as the Constitution does. Any intelligible discussion of how the Constitution is working today must commence with a description of the Administrative Procedure Act and what this statute has done to derogate the constitutional balance under the separation of powers.

V. George Mason's View

The oaths of office of government officials are enforced under the Constitution by means of the power of impeachment. George Mason was instrumental in placing the

impeachment power into our Constitution. He said of it: "No point is of more importance than that the right of impeachment should be continued. Shall any man be above Justice? Above all shall that man be above it, who can commit the most extensive injustice?" The Debates of the Federal Convention of 1787, Friday, July 20, reported by James Madison, The Avalon Project at Yale Law School.

E. A. The Engine of Enforcement Is the House of Representatives

"The House of Representatives shall choose their speaker and other officers; and shall have the sole power of impeachment." U.S. CONST., art. I, sec. 2

Contrary to contemporary thought, the power of impeachment is vital to the operation of the Constitution. This power resides in the House of Representatives. The key to the power for decades has been the Speaker of the House of Representatives. This person has been a good person to know, especially if you were a President or Supreme Court Justice. Impeachment is indeed an awesome power. Unfortunately for the people and the States in the last century, impeachment has been much more of a power by its nonuse than its use.

How many people are technically subject to impeachment now as compared to the early days of our nation? Back then, when there were relatively few in our government, there were relatively frequent impeachments including a United States Senator. The power is rarely considered today unlike the early years of our nation. Impeachment proceedings were expected and therefore were effective in the early part of our national history to investigate, try and sanction wrongdoers. But there must be safety in numbers for officials because impeachment has long been a rarity while human nature hasn't changed.

Impeachment has been downplayed or shelved for many of the reasons given in modern publications as bothersome, too time consuming, etc. The present Chief Justice has

written a book making a case against the procedure. However, it requires a constitutional amendment to remove or downgrade this provision if any official disagrees. Public relations campaigns do not change the Constitution one iota, however, it could change attitudes of persons, even creating attitudes in conflict with a person's oath of office. The Founding Fathers firmly believed, having dealt with Kings, that impeachment was absolutely vital to the functioning of the Constitution under the separation of powers. This was the enforcement mechanism under the separation of powers.

Does the fact that impeachment is thought to be passé effect this Court in its decision whether or not to risk opprobrium and get into an issue that involves all three branches of our government and the States. Are the members of this Court compelled under their oaths of office to face the principle issue raised by this case or controversy?

The Constitution requires perpetual vigilance with the regular use of the impeachment power. Of course, if the Founding Fathers' principal tool to enforce the separation of powers is impeachment, there is effectively no enforcement.

If the Constitution has been breached in a way that only three branches together could consummate, then judicial "good behavior" is a relevant issue and, it can be assumed, as is a similar standard of behavior for the legislative and executive branches as well.

F. B. Congress Is The Judge Of "Good Behavior."

"The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office." U.S. CONST., art. III, sec. 1. cl. 2

What does "good behavior" mean? Congress has never seen fit to define the term and yet the entire Federal Court system hinges upon it. What did the Founding Fathers think

good behavior meant and does their view differ from the present meaning of the term to the Judiciary today? This case asks: would the handling of the Administrative Procedure Act by the Courts be considered "good behavior" to the Founding Fathers? Does this question pose a conflict of interest for the Courts or even worse, incrimination problems based upon 55 years of exposure to a statute that should have been a constitutional amendment? Is not "good behavior" like jurisdiction to the Judiciary, it is fundamental to any Federal adjudication and so essential it can be raised at anytime.

Does the question for the Courts become who judges "good behavior" or has the question evolved to who is it we want to judge "good behavior?"

"The House of Representatives shall choose their Speaker and other Officers; and shall have the sole Power of Impeachment." U.S. CONST., art. I, sec. 2, cl. 5,

It appears the Courts have convinced the Congress to delegate its responsibility in this matter of behavior except when criminal charges have been filed. This requires the Executive branch and prosecutorial discretion. Is it because the Courts are thought to be smarter that Congress has done this or is it more likely to be the result of misinformation and lobbying. Absent across-the-board enforcement by Congress on the "good behavior" of members of the Judiciary, our Constitution is placed in jeopardy; i.e., the Administrative Procedure Act..

It is respectfully submitted, on the issue of judging "good behavior" that perhaps members of the Court might have a slightly different outlook on their tenure than perhaps a regularly elected Congressman would have, especially after a Fourth of July speech to his constituents. Courts are not made to serve at the pleasure of Congress but, when Judges misbehave, they are subject to impeachment by Congress. Using the Administrative Procedure Act as an example, perhaps misbehavior of Judges, individually and as a group, is not easily identified or seldom detected. Charges of

misconduct have not posed a significant peril to the Judiciary primarily because impeachment is treated as passé. It appears difficult for many to understand that the supervisory power of the Courts is not the separation of powers by any manner of means.

The whole picture presented by this case gives the appearance of a serious behavioral problem for all branches of the Federal government and the State Governments under the United States Constitution. The Federal Judiciary and the State Judiciaries, as well as all attorneys, are ethically charged with avoiding even the appearance of impropriety.

There is no constitutional parallel to the judicial "good behaviour" language under Article III applicable to executive officials or Congressional members and staff. See 3 Deschler's Precedents, Vo. 3, ch. 14, Sec. 3.7, at 429-34. It should not be overlooked, however, although not specifically mentioned in the Constitution, the President, the Congress and the States have behavioral standards as well. Those standards too appear to need some critical clarification, examination and reevaluation. This is where "prosecutorial discretion" comes into play and, in effect, sets the standards. Prosecutorial discretion is a bargaining chip in the Executive's back pocket of enormous influence although there is no mention of it in the Constitution. Good behavior is a constitutional necessity for the Federal Judiciary and a good standard for all governmental officials whether in the Federal or State government.

The Judicial branch is in a position to at least explain its current relationship with administrative agencies. Under good behavior, explaining the necessity of Article V authorization is the more troubling question for the Judiciary.

VI. Is It Possible the Supreme Court Does Not Care for Federalist 78?

G. A. Supreme Court's Failure to Cite The Federalist Papers Is a Serious Misstep

"Whoever attentively considers the different departments of power must perceive, that, in a government in which they are separated from each other, the judiciary, from the nature of its functions, will always be the least dangerous to the political rights of the Constitution; because it will be least in a capacity to annoy or injure them. The Executive not only dispenses the honors, but holds the sword of the community. The legislature not only commands the purse, but prescribes the rules by which the duties and rights of every citizen are to be regulated. The judiciary, on the contrary, has no influence over either the sword or the purse; no direction either of the strength or of the wealth of the society; and can take no active resolution whatever. It may truly be said to have neither FORCE nor WILL, but merely judgment; and must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments.

"This simple view of the matter suggests several important consequences. It proves incontestably, that the judiciary is beyond comparison the weakest of the three departments of power; that it can never attack with success either of the other two; and that all possible care is requisite to enable it to defend itself against their attacks. It equally proves, that though individual oppression may now and then proceed from the courts of justice, the general liberty of the people can never be endangered from that quarter; I mean so long as the judiciary remains truly distinct from both the legislature and the Executive. For I agree, that "there is no liberty, if the power of judging

be not separated from the legislative and executive powers." And it proves, in the last place, that as liberty can have nothing to fear from the judiciary alone, but would have every thing to fear from its union with either of the other departments; that as all the effects of such a union must ensue from a dependence of the former on the latter, notwithstanding a nominal and apparent separation; that as, from the natural feebleness of the judiciary, it is in continual jeopardy of being overpowered, awed, or influenced by its co-ordinate branches; and that as nothing can contribute so much to its firmness and independence as permanency in office, this quality may therefore be justly regarded as an indispensable ingredient in its constitution, and, in a great measure, as the citadel of the public justice and the public security.

"The complete independence of the courts of justice is peculiarly essential in a limited Constitution. By a limited Constitution, I understand one which contains certain specified exceptions to the legislative authority; such, for instance, as that it shall pass no bills of attainder, no ex-post-facto laws, and the like. Limitations of this kind can be preserved in practice no other way than through the medium of courts of justice, whose duty it must be to declare all acts contrary to the manifest tenor of the Constitution void. Without this, all the reservations of particular rights or privileges would amount to nothing." The Federalist Papers, Federalist 78, The Judiciary Department, Author: Alexander Hamilton

Perhaps members of the Court did not feel up to contending with James Madison and Alexander Hamilton in The Federalist Papers or Thomas Jefferson or George Mason for that matter in the Proceedings of the Constitutional Convention. The Federalist Papers plainly reflect the

commonly held view at the time of the Founding Fathers that the Judicial branch was the weakest branch. Therefore, the question becomes relevant whether the treatment the Judiciary has accorded the Administrative Procedure Act was used to enhance the Court's power vis-à-vis the other branches and the States?

The Petitioner has suffered the following harm, such as disregard of his Seventh Amendment right to a civil jury trial, the implementation of Social Security Ruling 79-2c over Congressional intent, the disregard of State judgments and res judicata and the disregard of State tooling and Social Security Act provisions requiring State determinations of disability and protection of doctor patient relationship, all derived from the Administrative Procedure Act.

H. B. It Is Time for the Supreme Court to Act

Once the Administrative Procedure Act was enacted with the aid of the Attorney General and Chief Justice in 1946, the Supreme Court, a branch of government that does understand the Administrative Procedure Act, has failed to rule on its constitutionality under the separation of powers while agencies were established and existing agencies, expanded.

VII. Does a Breached Constitution Lead to Boldness in Other areas of Law and Governance

I. A. Branching Out With Immunity

The growth of power within the Supreme Court of the United States and the Federal Judiciary has, in no small part, resulted from the erosion of States' power over decades. The Administrative Procedure Act has been central to this movement. There are other areas of governmental functioning that indirectly affect the manner in which the Petitioner's case has been handled that would remain indifferent if not mentioned. Not the least of these areas is the

subject of immunity that, like a veto, is raw power. Immunity is referred to only briefly in Article I and then exclusively in regard to Congress. The gradual development and spread of absolute and qualified immunity civilly and criminally to officials far and wide, including the reach and scope of the speech and debate clause of Article I, can be raw, unanswerable Federal, State, or local power

J. B. States Have Been Intimidated by Federal Courts

1. If not understood, it is thought by a number of attorneys that the Supreme Court bullied Florida in Bush v. Gore, 531 U.S. 98 (2000) treating the matter as an equal protection question rather than a political question that normally requires abstention. Regardless, this was a particularly strong statement from this Court over the other two branches and the State of Florida.

2. The power to treat campaign finance as a First Amendment issue rather than a political question gives broad judicial control over both the States and the Federal government.

VIII. Is Eleventh Amendment Immunity Waived if Not Timely Claimed?

The Eleventh Amendment states: "[t]he Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."

This immunity is actually in the Constitution and is relevant to this case because the Chief Justice of Iowa has been served as a result of the Petitioner's relationship to the Iowa Court system and Iowa law. Iowa has behaved badly in this case, a secret involuntary commitment in 1957 and a secret "discharge" in 1993—very strange, indeed. The Iowa

Constitution bars the Petitioner from voting and the U.S. Constitution guarantees it. Iowa involuntary commitment is an important part of this case, it is determinative of Social Security benefits if the intention of Congress is recognized but Iowa doesn't want to talk about it. The Court's have characterized the Eleventh Amendment as defensive and not applicable unless claimed.

IX. Some Will Say Necessity Was The Mother Of Invention

In these extensions of power, others might say such extensions are further examples of usurpation as characterized by the presence of the Administrative Procedure Act over a number of years. From a more philosophical approach, Robert A. Dahl would say, "Two epochal changes in perspective within half a century after the end of World War II: global expansion of both democracy and market capitalism…As the culture of consumerism gains predominance…the function of all "governments," whether "public" or "private", is simply to maximize the satisfactions of individual consumers of goods and services." Robert A. Dahl, Public Affairs Report, University of California, Berkeley, Vol. 40, No. 6, November 1999. Max Weber (b. 1864, d. 1920) would say he regards bureaucracy as supremely efficient, but regards its inevitable triumph with distaste. From Max Weber, H. H. Gerth and C. Wright Mills, translated and edited (New York, 1946), pp. 118-28, 147ff. Another might say, one reason for our current predicament is that Article V of the Constitution effectively gives small congressional minorities a veto over constitutional amendments.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,
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